Supreme Court, U. S.
FILED
JUL 31 1975
MICHAEL RODAK, JR., CLERK

75-172

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. A-13

STATE OF OHIO,
Appellant,

v.

THEODORE TYMCIO,
Respondent.

ON APPEAL FROM THE SUPREME COURT OF OHIO

JURISDICTIONAL STATEMENT

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ON APPEAL FROM THE SUPREME COURT OF OHIO
JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the Court of Appeals of Ohio, eleventh Appellate District upholding the decision of the Court of Common Pleas of Portage County, Ohio has not been reported therefore it is printed in Appendix A hereto. The opinion of the Supreme Court of Ohio in which it reversed and remanded the decision of the Court of Appeals is reported at 42 Ohio St. 2d 39, 325 NE 2d 556 (1975) and is set forth in the Appendix B hereto.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257 (2), this being an appeal from a decision of the Supreme Court of Ohio interpreting 2941.50 (A) of the Ohio Revised Code on the grounds that it is repugnant to the Sixth and Fourteenth Amendments of the Constitution of the United States.

The Appellee was convicted of violating Ohio Revised Code 2901.241 in the Court of Common Pleas of Portage County, on June 25, 1973, prior to this trial said Appellee was judged to be able to employ his own counsel under Ohio Revised Code 2941.50 (A). The Court of Appeals on February 25, 1974 affirmed the conviction of the Defendant-Appellee. On April 2, 1975, the Supreme Court of Ohio reversed the decision of the Court of Appeals and rejected the lower court's opinion as to the defendant's right to counsel under Ohio Revised Code 2941.50 (A) and remanded the case. The notice of appeal to the Supreme Court of the United States was hereby filed with the Supreme Court of Ohio on June 27, 1975, and subsequently the Supreme Court of the United States granted a motion to extend the docketing time of this cause to August 1, 1975.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED

This case involves the Sixth and Fourteenth Amendments to the Constitution of the United States and 18 USC 300 6A (b) which provides:

> Appointment of Counsel. - - In every criminal case in which the defendant is charged with a felony or a misdemeanor, other than a petty offense, and appears without counsel, the United States commissioner or the court shall advise the defendant that he has the right to be represented by counsel and that counsel will be

appointed to represent him if he is financially unable to obtain counsel. Unless the defendant waives the appointment of counsel, the United States commissioner or the court, if satisfied after appropriate inquiry that the defendant is financially unable to obtain counsel, shall appoint counsel to represent him. The United States commissioner or the court shall appoint separate counsel for defendants who have such conflicting interests that they cannot properly be represented by the same counsel, or when other good cause is shown. Counsel appointed by the United States commissioner or a judge of the district court shall be selected from a panel of attorneys designated or approved by the district court.

This case also involves Section 2941.50 (A) of the Ohio Revised Code 2941.50 (A) which states:

After a copy of an indictment has been served or opportunity had for receiving it, or if indictment be waived under section 2941.021 of the Revised Code, the accused shall be brought into court, and if he is without and unable to employ counsel, the court shall assign him counsel, not exceeding two, who shall have access to such accused at all reasonable hours. Such counsel shall not be a partner in the practice of law of the attorney having charge of the prosecution. A partner of the attorney having charge of the prosecution shall not be employed by or conduct the defense of a person so prosecuted.

QUESTION PRESENTED

Whether Ohio Revised Code 2941.50 (A) requiring courts to appoint counsel to defendants "unable to employ" counsel as interpreted by the Supreme Court of Ohio violates the right to counsel provisions of the Sixth and Fourteenth

Amendments to the Constitution of the United States, and 18USC 3006A(b) by requiring courts to use various unspecified factors in addition to financial status in determining a defendants right to appointed counsel?

STATEMENT OF THE CASE

1. The Events Leading to the Plaintiff's Arrest

On April 22, 1973, the defendant-appellee Theodore Tymcio was stopped by two (2) Ravenna City Policemen because he was suspected of driving while intoxicated. At this time the defendant a back-up unit was called into assist in the arrest. When one (1) of the officers from the "back-up" unit approached the front of the defendant's car, the defendant "peeled out", narrowly missing the approaching officer who had to jump out of the way to avoid being hit. The defendant was charged with violating Ohio Revised Code Section 2901.241, "Assault with Force Likely to Produce Great Bodily Harm".

2. The Hearing on the Defendant's Right to Appointed Counsel

The defendant was indicted by the Grand Jury on May 2, 1973. On May 11, 1973, the defendant appeared in the Portage County Court of Common Pleas with counsel and entered a plea of not guilty. Counsel filed a Motion for a Bill of Particulars and the hearing on that Motion was held on May 25, 1973. The defendant's attorney, appeared with the defendant at the Preliminary Hearing in the Municipal Court and subsequently requested a retainer from the defendant for the case. At the hearing on the Motion the defendant's attorney asked to be relieved of his obligations as counsel because the defendant refused to pay any attorney fees. Judge Jones, presiding over this hearing, interrupted this proceeding and held a hearing on the issue of the defendant's indigency. At that time the defendant filled out an affidavit with information as to his financial status. The Judge proceeded to gather further information on the defendant's

financial ability to obtain counsel. In answering some fifty-five questions the defendant stated he was working four to five days a week, eight hours per day at a rate of $4.50 per hour, occasionally working over-time. He lived in a house owned by his sister paying rent whenever he wanted to at no set rate. He had a car which he bought for $400.00 under a loan for $800.00 from his sister to which no rate of payment was set nor had any payments been made. Furthermore, the defendant had $240.00 a month of child support taken out of his paycheck to pay for his four children which he claimed as tax exemptions, leaving a net total pay of one hundred and twenty-five dollars every two weeks and a yearly tax refund of seven hundred dollars. The defendant went on to state that he could afford $10.00 every two weeks for a lawyer. At this point Judge Jones asked defendant's lawyer whether this would be sufficient payment to which this lawyer replied that such payments were not considering what the defendant took home every two weeks. The Judge declared that in view of these facts that the defendant was not an indigent and that he was able to employ his own counsel or to get a small loan to pay for such counsel.

3. Proceedings at the Trial Court

The trial was heard on June 25, 1973. Before the voir dire the defendant appeared without counsel, demanding that the court appoint counsel for him. The defendant explained that he was unable to borrow money from several banks and that none of the attorney's he had contacted would defend him without cash in advance. At this time Judge Caris explained that the defendant was determined to be able to employ counsel and that if he was unwilling to do so, he had to try your own case. The defendant continued to demand that an attorney be appointed and the court stated that the defendant was able to hire one that due to his persistent experience with the law the court felt that he was not totally unfamiliar with, trial procedure. Proceeding, the the jury was sworn in after the voir dire and the defendant

presented his case to the jury. A guilty verdict resulted and the defendant was sentenced and imprisoned.

On appeal to the Court of Appeals Eleventh District of Ohio the defendant was appointed counsel since he was then judged to be an indigent and on February 25, 1974, and this court upheld the conviction of the Court of Common Pleas. Thereafter on appeal to the Supreme Court of Ohio it was ruled on April 2, 1975, that the judgment of the Court of Appeals should be reversed. The cause was remanded to the Court of Common Pleas for further proceedings, since the trial court failed to insure that the defendant was adequately represented violating the decisions of *Gideon v Wainright* 372 US 335 (1965) and *Argersinger v Hamlin* 407 US 25 (1972).

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

In reviewing the case the Supreme Court of Ohio per Justice Paul W. Brown specifically cited the colloquy between the defendant and the Court at the trial on June 25, 1973. The Supreme Court recognized that. The trial court's initial factual determination of nonindigency was fairly made; however, the question arose whether the defendant's right to a court appointed attorney could be redetermined once his eligibility had been decided. The issues set out raised the federal question of the defendant's right to counsel under the Sixth Amendment as it applied to the States under the Fourteenth Amendment and the Court's obligation to appoint counsel to those unable to employ their own counsel. They are as follows: "Was the trial judge's assertion correct when, in response to the defendant's renewed request, he said, the court can't check into this because Judge Jones has already determined that you are able to hire counsel, thus holding that further inquiry into the defendant's inability to obtain counsel was precluded by the earlier determination of indigency. If not, what was the trial court's duty when con-

fronted with the representations here made, and by the accused's renewed request for assistance of counsel."

In answering these issues the cases of *Argersinger v Hamlin* 407 US 25 (1972); and *Gideon v Wainright* 372 US 335 (1963) were cited as giving defendants the right to the assistnace of counsel absent of knowing and intelligent waiver no person may be imprisoned for any offenses unless he was represented by counsel at his trial. Although indigency is generally the only reason for requiring the assistance of counsel, it is not the only standard which courts must use. This opinion stated that: "Clearly, a bare finding of non-indigency does not explain why an accused, such as the defendant in this case, who represents that he has been unable while under bond to obtain adequate counsel with his available resources because of demands for substantial cash retainers, must stand alone." Other factors were mentioned by the court which bear on the ability to employ counsel such as: "Here, one can discern from the record that the defendant was a troublesome man. He was contentious, violent in nature, estranged from his wife and family, frustrated by his inability to cope with his problems, and confronted with a serious charge against which there were perhaps few meritorious legal contentions or favorable facts. It can easily be seen why such a man, marginally indigent, might have difficulty in employing counsel".

The opinion stated that under Ohio Revised Code Section 2941.50 (A) the term indigency is not used but the phrase is one "unable to employ counsel." The test set by this court is: "To make the right to the assistance of court-appointed counsel a factual reality, the determination of need must turn, not upon whether an accused ought to be able to employ counsel, but, whether he is in fact able to do so. This test may be on its face a logical broadening of the Constitutional right to counsel but it fails to draw boundaries which previously existed using a test of indigency as a guide. A redetermination of eligibility for assigned counsel at a subsequent stage of the preceedings should be permitted only

ability becomes available. "When an accused is financially able, in whole or in part, to obtain the assistance of counsel, but is unable to do so for whatever reason, appointed counsel must be provided. In such case, appropriate arrangements may subsequently be made to recompense appointed counsel for legal services rendered."

The standard stated in this opinion increasingly broadens the right to counsel as set out in cases decided by the U.S. Supreme Court and as such fails to set adequate guidelines for courts making such decisions. A defendant can refuse to employ counsel and still be appointed one when there is no apparent inability monetarily on his part but merely a refusal to make a sacrifice of his own funds or his time to find counsel for matters in which it is his responsibility to so deal with.

WHY THE FEDERAL QUESTIONS RAISED IS SUBSTANTIAL

AS INTERPRETED BY THE OHIO SUPREME COURT, THE RIGHT TO THE ASSISTANCE OF COUNSEL CONSTITUTES AN IMPROPER AND UNDEFINED EXPANSION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY REQUIRING COURTS TO APPOINT COUNSEL FOR DEFENDANTS WHO ARE FOUND NOT TO BE INDIGENT.

The decision by the Supreme Court of Ohio interpreting Ohio Revised Code Section 2941.50 (A) expands the Sixth Amendment right to counsel beyond the boundaries of *Gideon v Wainright, supra, Argersinger v Hamlin, supra,* and 18 U.S.C.3006A(b). Courts under this decision are required to look at various factors which have not been specified as well as appoint counsel for those "marginally indigent." After the court had fully determined that defendant is financially able to employ counsel and grants him reasonable

time to find an attorney why must the court reconsider this question when this defendant's status was not changed? Does the constitutional right to appointed counsel extend to the "marginally indigent" and what guidelines should be used to determine when someone falls in this category? Does the court have to appoint counsel at the county's expense to those who refuse to make a full attempt to employ counsel when they have the personal resources and admits to being able to employ counsel?

In *Gideon v Wainright* 372 US 335 (1965) the Supreme Court declared that the Court must appoint counsel to those unable to employ their own counsel. An oft cited quote from this case cites the difference between indigents and people financially able to appoint their own counsel saying,

> "In our adversary system of criminal justice any person hauled into court, who is too poor to hire a lawyer cannot be assured a fair trial unless counsel is provided for him . . . . There are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses."

Although a court may in providing those unable to employ their own counsel, a few defendants feel that this gives them the right to court appointed or assigned counsel at their own terms or the county's expense irregardless of their actual financial condition. We feel that the law as prescribed in *Gideon v Wainright* does not impose on the Court the duty to be responsible for actively finding a defendant counsel when its been determined that he is able to acquire counsel and a nonindigent not requiring court appointed counsel.

As recognized by *Argersinger v Hamlin supra* it was held that a person could not be imprisoned without being represented by counsel. The dissent asserted the problems in appointing counsel to indigents, putting those self sufficient

may be at a disadvantage. As stated

> "The line between indigency and assumed capacity to pay for counsel is necessarily somewhat arbitrary drawn differently from State to State and after resulting in serious inequities to accused persons. The Court's new rule will accent the disadvantages of being barely self sufficient economically."

The dissent went on to say that:

> "But to require that counsel be furnished vitrialey every indigent charged with an imprisonable offense would be practical impossibility for many small town courts."

More recently the problem of Courts providing counsel has been recognized in *Fuller v. Oregon* (417 US 40 (1974) which upheld an Oregon statute for recoupment of legal fees when an indigent is financially able to pay for counsel at a later date. The Court recognized the burden on the system of subsidizing indigents for counsel fees stating,:

> "A defendant in a criminal case is just above the line separating the indigent from the nonindigent must borrow, sell off his meager assets or call upon his family or friends in order to hire a lawyer. We can't say that those only slightly poorer must remain forever immune from any obligation to shoulder the expenses of their legal defense, even when they are able to pay without hardship."

Here, our substantial question is to what extent must a court go in providing appointed or assigned counsel after it has adequately been determined by the trial court reviewing a prior decision that the accused is able on his own to employ counsel. The cases cited justify that the question is a constitutional one which falls within the Supreme Court's jurisdiction since the issue involves inter-

preting the extent that the Sixth Amendment right to counsel goes as compared to the uncertain standards set out in Ohio Revised Code Section 2941.50 (A) and the Supreme Court of Ohio's interpretation, must the right be extended to those "marginally indigent" and how can we define such a concept while separating the defendants refusing to attempt to find their own counsel from those truly unable to employ counsel. Additionally, this question is so substantial, as to require consideration by the court, since the decision by the Supreme Court of Ohio confused the guidelines as established by the Supreme Court cases mentioned. Substantially this leaves no viable standards for Ohio Courts to use in making their determinations of ability a defendant to employ his own counsel.

CONCLUSION

We feel that the Supreme Court's decision raises vital Constitutional issues as to what Standards courts must use in deciding whether the defendant is entitled to court appointed counsel as required by the Sixth Amendment and subsequent cases and for the reasons set out we pray that jurisdiction should be granted.

APPENDIX A

COURT OF APPEALS OF OHIO, ELEVENTH DISTRICT

COUNTY OF PORTAGE

COURT OF APPEALS CASE NO. 542

STATE OF OHIO

- vs -

ANNOUNCEMENT OF DECISION

THEODORE TYMCIO

Appellant

DATED: February 25, 1974.

This cause came on to be heard upon the record in the Trial Court, and was briefed and argued by counsel for the parties. Upon consideration whereof, this Court finds no error prejudicial to the appellant and, therefore, the judgment of the Trial Court is affirmed. Each assignment of error was reviewed and upon review the following disposition was made:

The matter before this Court, upon review, involves a criminal action. Tymcio was found guilty by a jury of

" I. Sixth Amendment Right to counsel Abridged.

II. Wrongful Denial of Appellant's Right to File Motion for New Trial."

The Record before this Court is silent as to the second error complained of so in that regard we must hold this error not to be well taken.

The Record does contain a Transcript of Proceedings which clearly indicates that Tymcio objected to going ahead with the trial without court-appointed counsel. He claimed indigency. Prior to the actual trial, a hearing was had on the issue of indigency and Judge Edwin Jones of the Portage County Court of Common Pleas found Tymcio not to be indigent. Judge Jones denied Tymcio counsel at State's expense. Judge Albert L. Caris presided over the subsequent trial before a petit jury.

The Transcript of Proceedings contains the hearing on issue of indigency. We have reviewed the same and hold that Judge Edwin Jones did not abuse his discretion in finding, after testimony of Tymcio was given and the affidavit of indigency was considered, that Tymcio could afford to hire his own lawyer. Accordingly, the first assignment of error is found not to be well taken.

The testimony of Tymcio indicated that he earned about $4.50 per hour at C. L. Gougler Machine Co.; that he had worked for the same company for about 23 to 24 years; and that he was working steady at the time of the hearing. Against this income Tymcio paid $240.00 per month child support, he owed his sister and brother-in-law $800.00 on a note (Payable at no time certain). There is some uncertainty as to whether or not he consistently paid rent to his sister and brother-in-law with whom he lived. An amount of rent was not mentioned. Tymcio's affidavit, of course, would indicate that he was indigent; however, his testimony clearly demonstrated that he was not.

The order before this Court is affirmed in all respects.

JUDGE
GEORGE M. JONES, Presiding Judge

HOFSTETTER, J.,
COOK, J., Concur.

NOTE: If a Journal Entry is not presented to this Court for signature within ten days from the filing date hereof, this Court will journalize this decision sua sponte (Rule 22D) and the time period for review will begin to run therefrom.

APPENDIX B

THE SUPREME COURT OF OHIO
OPINION AS REPORTED 42 OHIO STATE 2d 39
(No. 74-456 – Decided April 2, 1975)

THE STATE OF OHIO,
Appellee,

vs.

TYMCIO,
Appellant.

STATEMENT OF THE CASE

Appeal from the Court of Appeals for Portage County.

On April 22, 1973, Theodore Tymcio, appellant herein, was arrested and charged with aggravated assault, in violation of R. C. 2901.241. At his arraignment on May 11, 1973, while represented by counsel, he pleaded not guilty and was released on bond. On May 25, at a hearing scheduled to consider defendant's motion for a bill of particulars, defendant's counsel stated that he had not been paid, requested that he be relieved, and suggested that the defendant desired appointed counsel. The court relieved counsel, heard the question of the defendant's indigency, determined the issue adversely to the defendant, and denied the request for appointed counsel. The case was assigned for trial on June 25, 1973.

On that date, the defendant appeared for trial and the following colloquy occurred:

"By the Court: Mr. Tymcio do you have counsel here?

"Mr. Tymcio: No, I don't, and I would like to make a request for court appointed counsel. I have no funds and I made attempts to borrow money at The Second National Bank, the First National Bank and Gougler's Credit Union.

I went to several attorneys, * * * and I was turned down without cash in advance.

" * * *

"By the Court: The court has no other course open in view of the determination by Judge Jones on May 25th that you were not indigent and were able to employ counsel, and if you are unwilling to do it, you have the right to go ahead and try your own case in the absence of counsel.

"Mr. Tymcio: I said I wasn't trying it. I am asking for a court appointed counsel, and let this court check into it and they will see that I have no means.

"By the Court: The court can't check into this because Judge Jones has already determined that you are able to hire counsel. We will have to go forward with this trial, Mr. Tymcio.

"Mr. Tymcio: I have tried, and there is no possible way.

"By the Court: The court knows from his personal observation of you in heretofore cases that were tried that you have had some experience in being charged with offenses against the law. You are not thoroughly unfamiliar with the procedure, the court knows that because I went through a trial with you some months or years ago.

"Mr. Tymcio: That's right, and the court also said he wasn't going to do me any good unless I had counsel, whether I was right or wrong, not in them exact words, but in a little bigger terms.

"By the Court: The only option this court has now at this stage, in view of this finding of Judge Jones is to go forward with this case.

"Mr. Tymcio: It will be a one-sided case.

"By the Court: I am sorry, Mr. Tymcio, you had the opportunity since May 25th to get counsel.

"Mr. Tymcio: I have tried, but without money you can't get counsel.

"By the Court: That has been determined - - -.

"By the Court: Mr. Bailiff, bring the jurors into the court room.

"9:50 a.m. - - The jurors came into the court room and the bailiff seated the first twelve jurors.

"9:55 a.m. - - The bailiff gave the preliminary oath to the jurors.

"9:56 a.m. - - Voir dire examination by Mr. Kirkwood.

"By the Court: Mr. Tymcio, do you wish to direct any questions to the panel?

"Mr. Tymcio: Your Honor, I am not trying this case. It seems that the state is trying it. I asked for a court appointed attorney and I have been turned down and I have nothing to say.

"By the Court: As the court explained to you, Judge Jones of this court determined that you have the means to hire counsel and you chose not to do it.

"Mr. Tymcio: That isn't what I told him.

"By the Court: We can't put the trial off because you won't do it. He has determined that you are not indigent.

"Mr. Tymcio: I have tried to borrow money, and I went to attorneys and they want cash in advance.

"By the Court: We will have to go forward. Has the state any pre-emptory challenge?

Mr. Kirkwood: No, Your Honor, the state is satisfied with the jury.

"By the Court: Have you any pre-emptory challenge, Mr. Tymcio?

"Mr. Tymcio: I have nothing to say.

"By the Court: Swear the jury, Mr. Bailiff."

The jury was sworn. The trial proceeded, with defendant acting as his own counsel. A guilty verdict resulted, and defendant was sentenced and imprisoned.

Upon appeal, the defendant claimed that he had been denied his right to the assistance of counsel, in violation of the Sixth and Fourteenth Amendments to the United States Constitution. The Court of Appeals affirmed the judgment of the Court of Common Pleas.

The cause is now before this court pursuant to the al-

lowance of a motion for leave to appeal, and as a matter of right. Appellant has been granted counsel for this appeal.

Mr. Frank J. Cimino, for appellee.

Mr. Ronald J. Kane, prosecuting attorney, and *Mr. William G. Simon,* for appellant.

PAUL W. BROWN, J. The trial court's initial factual determination of nonindigency was fairly made. At that time, the defendant was regularly employed, had been freed on bond, and was scheduled to appear for trial. He knew that by reason of the court's determination of his non-indigency, he was obliged to seek counsel at his own expense. With the resources at his disposal, the defendant appeared able to make some reasonable arrangement for adequate representation.

When the defendant appeared in court 31 days later, he reported that he had been unable to obtain counsel, that he was unrepresented, and that he desired the assistance of court-appointed counsel.

With no great skill, he volunteered the reasons for his failure, sought a reevaluation of his eligibility, and protested when compelled to proceed to trial unassisted.

His conviction, this appeal and the record pose the following serious constitutional and procedural questions: Is the appellee correct in asserting that the sole issue involved in this case is whether the trial court abused its discretion in finding the defendant to be nonindigent? Was the trial judge's assertion correct when, in response to the defendant's renewed request, he said, "the court can't check into this because Judge Jones has already determined that you are able to hire counsel," thus holding that further inquiry into the defendant's inability to obtain counsel was precluded by the earlier determination of "indigency?" If not, what was the trial court's duty when confronted with the representations here made, and by the accused's renewed request for assistance of counsel?

We conclude that the appellee errs in asserting that the question before us concerns judicial discretion. The constitutionally protected right to the assistance of counsel is absolute. " * * * absent a knowing and intelligent waiver, no person may be imprisoned for any offense * * * unless he was represented by counsel at his trial." *Argersinger v. Hamlin* (1972), 407 U. S. 25, 37; *Gideon v. Wainwright* (1963), 372 U. S. 335.

The obligation to provide counsel is often said to run to the "indigent." Generally speaking, such a statement is true, because undisputed indigence, and the inability *for that reason alone* to obtain counsel, is the major reason requiring the assistance of court-appointed counsel. In fact, the temptation is to say that where nonindigency can be factually found, the appointment of counsel by the court not only is not required, but may not be permitted.

Such a rigid requirement would be arguable if indigency were judicially definable as an abstract term without regard to the circumstances of the particular case, and if indigency, as so defined, were the only actual fact bearing on the inability to obtain counsel in this and other cases.* But it is not.

Clearly, a bare finding of nonindigency does not explain why an accused, such as the defendant in this case, who represents that he has been unable while under bond to obtain adequate counsel with his available resources because of demands for substantial cash retainers, must stand alone.

Many factors may impinge upon a defendant's inability to obtain counsel, factors which may differ greatly from case to case. Here, one can discern from the record that the defendant was a troublesome man. He was contentious, violent in nature, estranged from his wife and family, frustrated by his inability to cope with his problems, and confronted with a serious charge against which there were perhaps few meritorious legal contentions or favorable facts. It can easily be seen why such a man, marginally indigent, might have difficulty in employing counsel.

That such circumstances exist was recognized by Attorney General Robert F. Kennedy, when, in his letter of transmittal of the Federal Criminal Justice Act of 1964 (H. R. Rep. 864, 88 Congress, 1st Sess. [1963]) to President John F. Kennedy, he stated: "* * * the term indigency (in 18 U.S.C. †3006A(a)) is avoided because of its implication that only an accused who is destitute may need appointed counsel or services." To avoid this implication, that Act applies to those "financially unable to obtain an adequate defense."

The same is true of Ohio Crim. R. 44(A) and R. C. 2941.50 (A), neither of which employs the term "indigency." Rather, both make reference to one who "is unable to employ counsel."

To make the right to the assistance of court-appointed counsel a factual reality, the determination of need must turn, not upon whether an accused ought to be able to employ counsel, but whether he is in fact able to do so. Absent a knowledgeable and intelligent waiver, a defendant may not be imprisoned unless he was represented by counsel at his trial. *Argersinger, supra; Gideon, supra.*

We hold that a preliminary determination of indigency can not be permitted to foreclose a redetermination of eligibility for assigned counsel, when, at a subsequent stage of a criminal proceeding, new information concerning the ability or inability of the accused to obtain counsel becomes available. It is then the duty of the trial court to inquire fully into the circumstances impinging upon the defendant's claimed inability to obtain counsel, and his consequent need either for assistance in employing counsel, or for the assistance of assigned counsel. When an accused is financially able, in whole or in part, to obtain the assistance of counsel, but is unable to do so for whatever reason, appointed counsel must be provided. In such case, appropriate arrangements may subsequently be made to recompense appointed counsel for legal services rendered.

The trial court's failure to ensure that defendant was

adequately represented by counsel violated the mandate of *Argersinger, supra,* and invalidates the judgment below. Therefore, the judgment of the Court of Appeals is reversed and the cause is remanded to the Court of Common Pleas for further proceedings.

Judgment reversed.

O'NEILL, C. J., HERBERT, CORRIGAN, STERN, CELEBREEZE and W. BROWN, JJ., concur.

APPENDIX C

COUNTY OF PORTAGE
COURT OF APPEALS CASE NO. 542

STATE OF OHIO

Appellee

- vs -

JOURNAL ENTRY

THEODORE TYMCIO

Appellant

This cause came on to be heard upon the record in the Trial Court, and was briefed and argued by counsel for the parties.

Upon consideration whereof, this Court finds no error prejudicial to the appellant and, therefore, the judgment of the Trial Court is affirmed. Each assignment of error was reviewed by the Court and disposed of as set forth in this *Announcement of Decision,* of earlier date, which is incorporated herein by reference.

It is ordered that appellee recover of appellant the costs herein taxed.

This Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Trial Court to carry this judgment into execution. A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

GEORGE M. JONES

EDWIN T. HOFSTETTER

ROBERT E. COOK

JUDGES

APPENDIX D

IN THE SUPREME COURT
OF THE
STATE OF OHIO

STATE OF OHIO
PLAINTIFF-APPELLANT

vs

THEODORE TYMCIO
DEFENDANT-APPELLEE

CASE NO. 74-456

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the State of Ohio, PLAINTIFF-APPELLANT, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of the State of Ohio reversing the judgment conviction affirmed by the Court of Appeals of Ohio entered herein on April 2, 1975.

This Appeal is taken pursuant to 28 U. S. C. 1257(2).

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BNF

75-172

Supreme Court, U. S.
FILED
NOV 5 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1975

No. A-13

STATE OF OHIO,

Appellant,

v.

THEODORE TYMCIO,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

MOTION TO DISMISS OR AFFIRM

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1975

No. A-13

STATE OF OHIO,

Appellant,

v.

THEODORE TYMCIO,

Appellee.

MOTION TO DISMISS OR AFFIRM

The Appellee moves this Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of the State of Ohio on the ground that it is manifest that the questions on which the decision of the cause depend are so insubstantial as not to need further argument.

I.

THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

A.

THE STATUTE

This case involves the Ohio Supreme Court's interpretation of Section 2941.50(A) of the Revised Code of the State of Ohio, protecting the right of an individual charged with a crime to be represented by an attorney. The statute states that the court shall appoint an attorney if the defendant is "without and unable to employ counsel."

B.

THE PROCEEDINGS BELOW

The Ohio Supreme Court held in the opinion below (42 Ohio St.2d 39) that the trial court failed "to ensure that defendant was adequately represented by counsel," reversing the judgment of conviction for the charge of felonious assault and remanding the cause to the trial court for further proceedings consistent with the holding of the court.

II.

ARGUMENT

THE CASE PRESENTS NO SUBSTANTIAL QUESTION NOT PREVIOUSLY DECIDED BY THE COURT

At no point has this court held that a State does not have the right to expand the protections and guarantees provided by the Constitution of the United States through State law. Yet, taken in its most favorable light, the case presently before the Court claims that the Ohio Supreme Court's interpretation of Ohio State law is erroneous in that it expands the right to counsel as guaranteed by the Sixth Amendment to the Constitution of the United States as made applicable to the several States by the Fourteenth Amendment. The Sixth Amendment, as is the case with all constitutional protections, sets forth the minimum requirements that must be met by both the Federal and State Courts. Ohio has passed legislation [Ohio Revised Code Section 2941.50(A)] consistent with this mandate and in the present case the court has rendered an interpretation of same. The claim of the State is that this interpretation is an expansion of this Sixth Amendment right and for some reason this Court should refuse to allow the State to make such a ruling. That no substantial question has been presented is clear to the point that no further argument is necessary.

III.

CONCLUSION

WHEREFORE, the Appellee respectfully submits that the questions upon which this cause depend are so insubstantial as not to need further argument, and the Appellee respectfully moves this Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in the cause by the Supreme Court of the State of Ohio.

PROOF OF SERVICE

The attorneys for the Appellee hereby certify that copies of the foregoing Motion to Dismiss or Affirm were served upon Frank J. Cimino, Assistant Portage County, Ohio, Prosecuting Attorney, 247 South Chestnut Street, Ravenna, Ohio 44266, Attorney for Appellant, this 5th day of November, 1975, by First Class United States Mail.